KHALIAH ABBAS

v.

PESAKA CAPITAL CORPORATION SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-04-122 OF 1995]
14 NOVEMBER 1996

LABOUR LAW: *Industrial Court - Jurisdiction - Dismissal of a probationer - Whether Industrial Court seised of jurisdiction to hear representation of a probationer - Whether a probationer is a workman within the meaning of s. 20(1) Industrial Relations Act 1967*

The appellant, a probationer employee of the respondent, was dismissed at the end of her probationary period. The dispute was referred to the Industrial Court whereupon the tribunal held that the dismissal was without just cause or excuse, and awarded the appellant compensation of nine months arrears. The respondent applied for an order of *certiorari* to quash the award, whereupon the High Court ruled that the appellant, being a probationer, is not a 'workman' within the meaning of s. 20(1) of the Industrial Relations Act 1967, and the Industrial Court, therefore, had no threshold jurisdiction to entertain the appellant's representation. The appellant appealed and before the appellate Court questions arose as to (i) whether the appellant is in law a 'workman' (ii) whether the Industrial Court is seised of jurisdiction to hear a representation of a probationer.

Held:
Per Shaik Daud Ismail JCA

[1] An employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bona fide is thus essential in his dismissal. If the dismissal is found to be a colourable exercise of the power to dismiss or a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and set aside such dismissal.

[2] It is unfortunate that the High Court below never discussed or even considered the Federal Court case of *V. Subramaniam & Ors v. Craigielea Estate* though it was cited in argument before it. Instead the Court chose to consider and rely on Industrial Court rulings, which rulings are not binding on the High Court.

[2a] The implication of *V. Subramaniam's* case is that, employees on probation do come within the purview of s. 20(1) of the Act and that the Industrial Court therefore has jurisdiction to decide on the issue of whether their dismissal was without just cause or excuse.

[3] The learned Judge had thus erred in law in holding that the Industrial Court had no threshold jurisdiction to entertain the appellant's representation.

[Appeal allowed. Order of High Court set aside. Award of Industrial Court restored.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG BURUH: *Mahkamah Perusahaan - Bidangkuasa - Pembuangan kerja penjawat dalam percubaan - Samada Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar representasi seorang penjawat yang masih dalam percubaan - Samada penjawat dalam percubaan merupakan seorang pekerja menurut maksud s. 20(1) Akta Perhunugan Perusahaan 1967*

Perayu, seorang pekerja responden yang masih dalam percubaan, telah dibuang kerja di akhir tempoh percubaannya. Pertikaian berhubung dengannya telah dirujuk kepada Mahkamah Perusahaan di mana tribunal tersebut telah memutuskan bahawa pembuangan kerja tersebut adalah tanpa alasan dan sebab yang adil dan seterusnya mengawadkan pampasan sebanyak sembilan bulan gaji kepada perayu. Responden memohon untuk perintah *certiorari* untuk mengenepikan awad di atas, dan berikutnya Mahkamah Tinggi memutuskan bahawa perayu, sebagai penjawat yang masih dalam percubaan, bukanlah seorang 'workman' seperti yang dimaksudkan oleh s. 20(1) Akta Perhubungan Perusahaan, dan Mahkamah Perusahaan, dengan itu, tidak mempunyai bidangkuasa 'threshold' untuk melayani permohonan perayu. Perayu merayu dan di hadapan Mahkamah rayuan persoalan berbangkit berhubung (i) samada perayu adalah seorang 'workman' di sisi undang-undang (ii) samada Mahkamah Perusahaan mempunyai bidangkuasa untuk mendengar representasi dari seorang penjawat yang masih dalam percubaan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Seorang pekerja yang masih dalam percubaan memiliki hak yang sama dengan pekerja tetap atau mereka yang sudah disahkan dalam jawatan, dan perkhidmatannya tidak boleh ditamatkan tanpa sebab dan alasan yang saksama. Keperluan *bona fide* adalah dituntut dalam pembuangan

kerjanya. Jika pembuangan kerjanya itu dibuat melalui pelaksanaan kuasa membuang yang dikotori oleh motif tertentu, atau pun berpunca dari suatu diskriminasi atau pelaksanaan peraturan buruh yang tidak adil, maka Mahkamah Perusahaan mempunyai bidangkuasa untuk mencampuri dan mengenepikan perintah pembuangan kerja tersebut.

[2] Adalah malang bahawa Mahkamah Tinggi di bawah tidak sedikit pun membincangkan, malah tidak pun mengambilkira, kes *V. Subramaniam & Ors v. Craigielea Estate* yang diputuskan oleh Mahkamah Persekutuan, walaupun kes tersebut telah dikemukakan dihadapannya. Mahkamah dibawah sebaliknya memilih untuk meneliti dan bergantung kepada keputusan-keputusan Mahkamah Perusahaan, keputusan-keputusan mana adalah tidak mengikat Mahkamah Tinggi.

[2a] Implikasi kes *V. Subramaniam* ialah, pekerja-pekerja dalam percubaan adalah terangkum dalam skop s. 20(1) Akta, dan Mahkamah Perusahaan, oleh hal yang demikian, mempunyai bidangkuasa ke atas isu samada pembuangan kerja mereka adalah tanpa sebab atau alasan yang saksama.

[3] Dengan demikian, Hakim yang bijaksana adalah silap di sisi undang-undang dalam memutuskan bahawa Mahkamah Perusahaan tidak mempunyai bidangkuasa threshold untuk melayani permohonan perayu.

[Rayuan dibenarkan. Perintah Mahkamah Tinggi diketepikan. Awad mahkamah Perusahaan dipulihkan.]

Cases referred to:
V. Subramaniam & Ors v. Craigielea Estate [1982] 1 MLJ 317 ***(foll)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-50-94]

For the appellant - LG Seah; M/s Lobo & Assoc
For the respondent - A Ramadass; M/s Ramadass & Assoc

JUDGMENT

Shaik Daud Ismail JCA:

The High Court allowed an application by the respondent for *certiorari* and quashed the award of the Industrial Court on the ground that that Court lacked jurisdiction.

The appellant joined the services of the respondent on 2 May 1991 as an administrative assistant and was placed on three months' probation. At the end of her probationary period on 31 July 1991, she was dismissed on the ground that she had "not met the standard requirements for confirmation." She contends that she was unfairly dismissed and her representation was eventually referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ('the Act') by the Minister of Human Resources.

After hearing evidence from both the appellant and the respondent, the Industrial Court concluded that her dismissal was without just cause or excuse, but instead of ordering reinstatement as prayed for, the Court awarded her compensation of nine months arrears of salary.

In the High Court, the respondent contended that the appellant being a probationer was not a workman within the meaning of s. 20(1) of the Act and that therefore the Industrial Court had no threshold jurisdiction to entertain her representation. This stand was never taken by the respondent in the Industrial Court itself. The High Court agreed with the respondent's contention and allowed the application for *certiorari* and quashed the award of the Industrial Court.

The issue before the High Court and this Court is whether the appellant, a probationer, is a workman within the meaning of s. 20(1) of the Act. Section 2 of the Act defines workman to be:

> ... any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Whether the Industrial Court has jurisdiction to hear a representation of a worker on probation came to be decided in *V. Subramaniam & Ors. v. Craigielea Estate* [1982] 1 MLJ 317. The facts of the case slightly differ from the present case but the issue is the same i.e. it concerns a representation made by a probationer. In that case the appellants were employed on probation by the respondent estate. At the end of their probationary period they were neither confirmed nor dismissed but they carried on in their services. They took part in a strike organised by the Union to which they belonged and in doing so they were absent from their work. The respondent estate informed them that as they had been absent from their work without lawful or reasonable excuse for more than two consecutive days, the estate had terminated their employment. The matter was referred eventually to the Industrial Court. The

Industrial Court made a finding that their dismissal was without just cause or excuse and ordered their reinstatement as confirmed in their appointments presumably because their period of probation was over. The respondent estate applied for an order of *certiorari* and the High Court held that the Industrial Court had no jurisdiction to hear the appellants' representations, and made an order quashing the award. On appeal to the Federal Court it was held that the Industrial Court had jurisdiction to hear and determine the issue ie, whether the dismissal of the appellants were with just cause or excuse. Having arrived at that decision the Federal Court allowed the appeal and restored the Industrial Court's award save that the employees be reinstated only as trainees or on probation. We are of the view that the implication of this decision is the employees on probation come within the purview of s. 20(1) of the Act and that the Industrial Court has jurisdiction. It is conceded that the word "probation" or "probationary" is not found in the definition of workman in s. 2 of the Act, but the word "apprentice" is mentioned and an apprentice to our mind would normally be a probationer, as was held in the *V. Subramaniam's* case. The Act, being a piece of social legislation should be given a broad and liberal interpretation. (See *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1997] 1 CLJ 665). It is unfortunate that the High Court never discussed or even considered *V. Subramaniam's* case although the records show that it was cited in arguments by both Counsels before it. Instead the Court chose to consider and rely on a number of Industrial Court rulings, which rulings, with respect, are not binding on the High Court.

It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of *bona fide* is essential in the dismissal of an employee on probation but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or as a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal. In the present case we find that the Industrial Court made a finding of fact that the dismissal of the appellant was without just cause or excuse.

In the circumstances, we find that the learned Judge erred in law in holding that the Industrial Court has no threshold jurisdiction. We allowed the appeal with costs, set aside the order of the High Court, restored the award of the Industrial Court, and ordered the deposit to be refunded to the appellant.

Reported by WA Sharif